In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1639

ANTAR A. R. SULAIMAN AND OVER 21 BOOK CLUB, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' contentions are essentially those that this Court rejected in *Hamling v. United States*, No. 73-507, decided June 24, 1974. They contend that their obscenity convictions must be reversed because they were tried under the *Roth-Memoirs* standards applicable at the time of trial, before this Court decided *Miller* v. *California*, 413 U.S. 15, and related cases; that the indictment was insufficient; that *scienter* was not established; and that the application of both *Memoirs* and *Miller* standards by the court of appeals violated the *ex post facto* Clause. Petitioners also contend that their convictions cannot stand because the government did not introduce evidence, other than the obscene materials themselves, to prove that the materials violated national community standards, appealed to prurient interest, and were utterly without redeeming social value.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted under guidelines in effect prior to this Court's decision in *Miller, supra*, of ten counts of mailing obscene films and advertisements, in violation of 18 U.S.C. 1461. Petitioner Sulaiman was sentenced to ten concurrent terms of two years' imprisonment and fined $25,000. Petitioner Over 21 Book Club, Inc., was fined $35,000. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence at trial is summarized in the petition, pp. 6-8. Briefly, it shows that Postal Inspector Wolff testified that, using various fictitious names, he ordered from petitioners the alleged obscene films and advertisements referred to in each count of the indictment except Count 5. Marian Yonge testified that she received the advertisements referred to in Count 5 at her home in an envelope addressed to I. Yonge.

Postal Inspector Cuthbert testified that he accompanied a United States Marshal who arrested petitioner Sulaiman in one of the offices of petitioner Over 21 Book Club, Inc., in North Hollywood, California. When arrested, Sulaiman was opening mail addressed to the Over 21 Book Club. Cuthbert also saw, in an office connected to the office in which Sulaiman was sitting, five boxes containing copies of two brochures, which Cuthbert identified as being the same brochures which were the subject of two of the counts.

It was stipulated that the Over 21 Book Club, Inc., is incorporated in the State of California, that Sulaiman was president of the corporation and, as of January 28, 1971, its sole director and officer. It was further stipulated that Sulaiman arranged for a checking account in the name of Over 21 Book Club, Inc., and also ordered

the installation of a Pitney-Bowes postal meter. The envelopes referred to in each count of the indictment bore the same postal meter number as the installation receipt for the postal meter.

Sulaiman testified that he had been in the mail order business for a little over a year and conducted his business pursuant to the advice of counsel. Sulaiman admitted that he used the mails to distribute these brochures and films.

As previously noted, this Court rejected all of petitioners' substantive contentions in *Hamling* v. *United States, supra.*

1. Petitioners contend that they were improperly convicted under pre-*Miller* standards. As this Court ruled, however, petitioners were entitled to any benefits available to them under *Miller.* They received those benefits.

a. The trial court did not specifically instruct the jury to apply national community standards, but rather spoke in terms of the community as a whole, as follows (Record on Appeal, p. 94):

> In determining contemporary community standards the jury may consider what, as shown by the evidence in the case, appears in contemporary magazines, books and newspapers, television, motion pictures, novels and other media of communication which are freely available in the community as a whole.

This instruction substantially complies with *Miller*, as explained in *Hamling, supra*, slip op. at 14, because it does not require the jury to apply a nationwide standard (although referring to communications that are national in scope), but allows the jurors to draw on their own knowledge acquired in the community.

b. The limitation of the term "obscene * * * matter" used in 18 U.S.C. 1461 to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller, supra*, 413 U.S. at 25, (*United States* v. *12-200 Ft. Reels of Film*, 413 U.S. 123. 130, n. 7) does not render 18 U.S.C. 1461 vague as it was construed prior to *Miller*. The materials here are hard-core pornography within the permissibly proscribed depictions described in *Miller. Hamling, supra*, slip op. at 20-26.

c. In addition, *Miller's* rejection of the "social value" formulation in *Memoirs* did not mean that 18 U.S.C. 1461 was constitutionally vague at the time of petitioners' convictions because it did not provide them with sufficient guidance as to the proper test of "social value." The social value formula was rejected in *Miller* not for reasons of vagueness but because it departed from *Roth's* obscenity definition and entailed a virtually impossible prosecutorial burden. *Roth* v. *United States*, 354 U.S. 476. *Hamling, supra*, slip op. at 26-27.

2. The indictment, tracking the terms of the statute, was sufficiently definite to apprise petitioners of the charges against them. The statutory term "obscene" is a legal term of art and not a generic expression, and gave adequate notice of the charges against petitioners. *Hamling, supra*, slip op. at 27-29.

3. The court's instruction on *scienter* that the government must show that petitioners had knowledge that the envelope contained the obscene picture or pictures at the time the envelope was deposited for mailing and delivery satisfied constitutional requirements. The government need prove only that petitioners knew the nature of the contents of the envelopes. *Rosen* v. *United States*, 161 U.S. 29. If petitioners knew that the envelope contained the picture in question, *a fortiori*, they knew its

nature. Proof that they knew it was legally obscene is not required. *Hamling, supra*, slip op. at 33-34. Moreover, the court's instruction which mistakenly required the jury to find that petitioners "willfully" rather than "knowingly" mailed the obscene materials accrued to petitioners' benefit, since "willfully" encompasses "knowingly" and also requires a finding of specific intent. The evidence was, as the court below found, sufficient to support the jury's verdict. *Hamling, supra*, slip op. at 29-34.

4. Review by the court of appeals under both the *Memoirs* and *Miller* standards did not constitute an *ex post facto* law or violate due process principles. By allowing petitioners any benefits from the *Miller* standards, as well as applying the stricter *Memoirs* standards, the court did not make criminal conduct that was legal prior to *Miller*. The enumeration in *Miller* of specific categories of obscene material did not purport to proscribe, for purposes of 18 U.S.C. 1461, conduct that had not previously been thought criminal, but instead added a "clarifying gloss" to the prior construction making the statute's meaning more definite. *Bouie* v. *City of Columbia*, 378 U.S. 347, 353. *Hamling, supra*, slip op. at 25-26.

5. Petitioners raise the additional contention that the government failed to prove its case because it did not introduce evidence, other than the obscene materials themselves, that the materials exceeded customary limits of candor or were without social value. This Court has specifically held that materials standing alone may provide sufficient proof of their obscenity to sustain a conviction. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56; *Kaplan* v. *California*, 413 U.S. 115, 121.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.